FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Lahaina, Maui, Hawaii)

HOTEL CORPORATION OF THE PACIFIC, INC.
d/b/a ASTON HOTELS AND RESORTS

Employer

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 5, AFL-CIO — Case 37-RC-3948

Petitioner

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO

Intervenor

HOTEL CORPORATION OF THE PACIFIC, INC.
d/b/a ASTON HOTELS AND RESORTS

Employer-Petitioner

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 5, AFL-CIO — Case 37-RM-167

Union

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding 1/, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **2**/

3. The labor organization*(s)* 3/involved claim*(s)* to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. **4**/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: **5**/

All full-time and regular part-time and casual employees employed by the Employer at its Lahaina, Maui, facility in housekeeping, bell, and maintenance services including grounds employees; excluding all other employees, managerial employees, confidential employees, professional employees, guards and supervisors **6**/ as defined by the Act.

OVER

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Hotel Employees and Restaurant Employees, Local 5, AFL-CIO or International Longshore and Warehouse Union, Local 142, AFL-CIO or neither labor organization**. **7**/

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii, on or before September 21, 2000**.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by September 28, 2000.

Dated September 14, 2000

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The post hearing stipulation of the parties is hereby received into the record as Board Exhibit 2a.

2/ The parties stipulated that the Employer, a corporation with an office and place of business at Lanaina, Maui, Hawaii, is engaged in the operation of resorts within the State of Hawaii. During the twelve month period ending May 30, 2000, the Employer derived revenues in excess of $500,000 from its operations and purchased and received at its Hawaii facilities products of a value exceeding $5,000 which originated outside the State of Hawaii. Based on the parties' stipulations to such facts, it is concluded that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3/ The parties stipulated that Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and International Longshore and Warehouse Union, Local 142-AFL-CIO are each a labor organization within the meaning of the Act.

4/ The Employer's operation which is the subject of the petitions herein is located on a property in an area known as the Kaanapali Beach Resort Area on the Island of Maui in the State of Hawaii. The property, which extends for about five to seven acres of land, is called the "Whaler." There are two towers of approximately equal size on the property. The two towers are joined at the subterranean level by a common parking structure and at the lobby level by a landscaped area and a pool area which join the two buildings. Within the two buildings are about 354 studio, one-bedroom, and two-bedroom units. The "Whaler" property including the two towers is owned as a condominium. The owners of the units have formed an entity called the Association of Apartment Owners of the Whaler on Kaanapali Beach, herein referred to as the Association.

On June 1, 2000, the Employer consolidated two previously separate operations at the Whaler property pursuant to a successful bid made to the Association. These two separate operations were carried out prior to June 1 by Village Resorts, Inc., herein called Village, a subsidiary of Premiere Resorts, Inc., and the Association. Village provided housekeeping, bell and maintenance services including, among others, the cleaning of the units which were rented by those condominium owners who chose to participate in a rental program. The Association itself employed maintenance and groundskeeping employees who worked on the Whaler property. The employees of Village on the property were represented for collective bargaining purposes by International Longshore & Warehouse Union, Local 142, AFL-CIO, herein called Local 142. The employees of the Association who performed maintenance and groundskeeping work on the property were represented by Hotel Employees and Restaurant Employees, Local 5, AFL-CIO, herein called Local 5.

The Employer, Local 5, and Local 142 have stipulated that a unit comprised of the Employer's housekeeping, bell and maintenance employees is appropriate for purposes of collective bargaining. No party contends that the separate units previously represented by Local 5 and Local 142 remain appropriate for the

purposes of collective bargaining. The Employer and Local 5 contend, contrary to Local 142, that an election should be directed in the stipulated unit of the Employer's employees. However, Local 142 takes the position that the unit of Association employees previously represented by Local 5 constitutes an accretion to the unit of Village employees previously represented by Local 142 and that consequently, no question concerning representation exists.

On December 27, 1977 Local 142 was certified by the Board in Case 37-RC-2379 as the collective-bargaining representative of a unit of the employees of Village. The unit was as follows: "All full-time and regular part-time employees of the Employer employed in the housekeeping department and employees classified as bellmen, on the island of Maui; excluding office clerical employees, confidential employees, professional employees, guards and/or watchmen, and supervisors, including the executive housekeeper and assistant executive housekeeper."

Local 142 and Village were parties to a collective-bargaining agreement, which was effective on its face from September 1, 1995 to and including August 31, 1999. The agreement covered all regular and casual employees of Village who were engaged in housekeeping, maintenance and bell services; excluding confidential employees, office clerical employees, PBX employees, front office employees, guards and/or watchmen, professional employees and supervisors as defined by the Act. No agreement between Local 142 and Village was negotiated for the period subsequent to August 31, 1999. The agreement which expired on August 31, 1999 stipulated that Village would provide three medical plan options to the unit employees and a designated dental plan. The contract also provided for employer contributions to the Hotel Industry ILWU Pension Plan. The "Successors and Assigns" section provided as follows: "In the event the Company is sold, the terms and conditions of this Agreement shall apply to the purchaser to the extent required by the rules and doctrine for successor employers of the National Labor Relations Board."

On October 11, 1979, Local 5 was certified by the Board in Case 37-RC-2498 as the bargaining representative of a unit of employees of the Association. The unit was as follows: "All full-time and regularly scheduled part-time employees in the maintenance department located at Kaanapali Beach, Lahaina, Maui; excluding confidential employees, professional employees, guards and/or watchmen and supervisors as defined in the Act, and all other employees."

Local 5 and the Association are parties to a collective-bargaining agreement which is effective on its face from April 1, 1999 to and including March 31, 2002. The agreement covers all employees of the Association employed by the Association at its 2481 Kaanapali Parkway, Lahaina, Hawaii location excluding guards and supervisors as defined by the Act. The agreement obligated the Association to provide health coverage including medical care, vision care, prescription drugs and dental care. The contract does not provide for pension or other retirement benefits. The section of the contract entitled "Successors and

Assigns" provides that the agreement "shall be binding upon both parties, their successors and assigns". Moreover, in the event of the sale or transfer of the business the contract provided that "the purchaser or transferee shall by bound" by the agreement.

The Employer hired its full complement of 44 nonmanagerial employees at the Whaler Property on June 1, 2000, the date on which it commenced its operation at that location. There is specific record testimony on whether 42 of the 44 employees had worked for Village or the Association. Of these 42 employees 28 had worked for Village and 14 for the Association. With respect to William Greene who was employed by the Employer as a groundskeeper and Erwin Farargan who was employed by the Employer as a painter, there was no specific testimony as to whether they worked for Village or the Association. However the classifications of groundskeeper and painter were filled by Association employees prior to June 1, 2000. The Attorneys for Local 142 stated in their brief that Faragan and Green were employed by the Association. Accordingly, it is found that Faragan and Greene were employed by the Association prior to June 1, 2000.

The employees hired by the Employer on June 1, 2000 were engaged in performing housekeeping, bell, and maintenance work at the Whaler Property. The Employer hired almost all of the employees who had worked at the property for the Association and Village. The functions performed by the Employer's employees at the property are substantially similar to the work which they performed for the prior employers. The housekeeping employees and the bellmen work the same shifts as before June 1, 2000.

The Employer's General Manager is responsible for the overall direction of the Employer's operation at the Whaler property. He was not a manager at the property prior to June 1, 2000. He directs those employees who previously worked for the Association and those who previously worked for Village. The other four upper level management positions at the Whaler property are Resident Manager, Front Office Manager, Executive Housekeeper and Director of Engineering. The individuals holding these positions other than the Director of Engineering held management positions at the Whaler property prior to June 1, 2000.

The Employer's personnel policies and rules of employee conduct are set forth in the Employer's Employee Handbook. They apply to all of the Employer's employees at the Whaler property whether they worked previously for Village or the Association. All of the Employer's employees at the Whaler Property are subject to the same wage and salary policy and are eligible for the same benefits. The Employer's employees do not receive credit for their time worked for Village and the Association when the Employer computes their length of service.

The record evidence supports the stipulation of the parties that an overall unit consisting of the Employer's housekeeping, bell and maintenance employees at the Whaler property is appropriate for the purposes of collective bargaining. The Employer has created a new operation by consolidating two previously separate units of employees. The new operation is under common management and administration and there is centralized control of labor relations. These changed circumstances have obliterated the previous separate identities of the two units which existed when each group worked for different employers. Now, both groups of employees are employed by the same employer under common terms and conditions of employment. Accordingly, the one overall unit of the employees of the Employer at the Whaler property is now the sole appropriate unit. Martin Marietta Co., 270 NLRB 821, 822 (1984).

As noted above, it is the position of Local 142 that the bargaining unit of Association employees formerly represented by Local 5 constitutes an accretion to the unit of Village employees represented by Local 142. The rule governing the determination whether an accretion has occurred when two groups of union-represented employees are consolidated was set forth by the Board in Martin Marietta Co., supra, at page 822, as follows:

> When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation. Boston Gas Co., 221 NLRB 628 (1978)

In support of Local 142's contention that the unit of former Association employees constituted an accretion to the unit of former Village employees, the attorneys for Local 142 cite the case of Central Soya Co., 281 NLRB 1308 (1986). The Central Soya case involved the consolidation of a group of unrepresented employees with a group of represented employees. The Board held that the group of unrepresented employees constituted an accretion to the unit of represented employees. However, the Board specifically determined in Special Machine & Engineering, 282 NLRB 1410 (1987), that the Martin Marietta rule does not apply to a consolidation of an unrepresented group of employees with a group of represented employees. Rather the Martin Marietta rule applies only to consolidations of two or more groups of union-represented employees. Thus the legal standard governing whether a question concerning representation exists in the instant case differs from the standard applied in Central Soya Co., supra. Accordingly, the Central Soya decision does not apply to the determination whether a question concerning representation exists in the instant case.

The attorneys for Local 142 contend in their brief that various factors support a determination that the unit of former Association employees represented by Local 5 constitutes an accretion to the unit of former Village employees represented by

Local 142. First, the employees of the Employer who previously worked for Village predominate in number over the employees who previously worked for the Association. Second, the employees in the two units who worked at the Whaler location prior to June 1, 2000 worked side-by-side. Third, some of the supervisors who worked at the facility prior to June 1, 2000 have continued to work for the Employer. Fourth, the employees employed by the Employer have continued to perform substantially the same functions which they had performed for Village or the Association. Fifth, if there is no finding of accretion, the former Village employees will be at risk of losing credit for their years of prior service and the elimination of unvested pension benefits.

The record shows that the Employer's initial complement of employees included 28 from the bargaining unit represented by Local 142 and 16 from the bargaining unit represented by Local 5. Thus 63.6% of the Employer's employees had worked in the bargaining unit represented by Local 142. The issue arises whether the percentage of employees represented by Local 142 was "sufficiently predominant" to remove a question concerning representation. In National Carloading Corp., 167 NLRB 801, 802 (1967), the Board considered whether the consolidation of a unit of 34 employees represented by one labor organization with 20 employees represented by another labor organization constituted an accretion. The Board held that the larger unit of employees which was 63% of the total was not sufficiently predominant to constitute an accretion. The Board stated that "it is also plain that neither group of affected employees is sufficiently predominant to remove any real question concerning representation." In Boston Gas Company, 235 NLRB 1354, 1355 (1978), the Board held that a unit of 184 employees or 69.7% of the merged work force was sufficiently predominate so as to create an accretion.

The 63.6 percent of the Employer's work force which consisted of former Village employees is almost identical to the 63 percent found by the Board in National Carloading Corp., supra, as not sufficiently predominant to remove a question concerning representation. The Board stated in National Carloading Corp., supra, that it was plain that the larger group of employees was not sufficiently predominant. Accordingly, it is determined that the percentage of the Employer's work force in the instant case which consisted of former Village employees is not "sufficiently predominant" to remove a question concerning representation.

The factors cited in Local 142's brief do not establish a basis for finding that the group of former Association employees constitutes an accretion to the group of former Village employees. The Board's decision in Martin Marietta Co., supra, does not establish any exceptions to the requirement that one of the groups of represented employees must be "sufficiently predominant" over the other group in a consolidation situation in order to remove a question concerning representation. The purported special circumstances relied upon by Local 142 in its brief do not constitute a basis under Board law for finding an accretion where there is no showing of a sufficiently predominant majority. Martin Marietta Co., supra. Local 142 has not cited any case where the Board has found a

percentage of 69 percent or lower to meet the Martin Marietta requirement. The Board's decision in Boston Gas Company, 235 NLRB 1354 (1978) which Local 142 cited in its brief held that a percentage of 69.7% was sufficiently predominant to remove a question concerning representation. However the Boston Gas decision did not hold that there were any situations in which the requirement of sufficient predominance did not apply to the consolidation of two represented groups. As the Board stated in National Carloading Corp., supra, it is necessary to resolve conflicting representational claims through the processes of a Board-conducted election so that "influences disruptive to industrial peace and a harmonious bargaining relationship will be eliminated."

The attorneys for Local 142 argue in their brief that the Board's Martin Marietta rule "is ripe for reexamination." However the undersigned is required to apply existing Board law in the instant case and lacks the authority to modify Board law.

5/ The unit description is in accord with the stipulation of the parties.

6/ The parties stipulated that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Kim Puaa, Executive Housekeeper; Charlotte Kahalii, Front office Manger; Carl Shelton, Director of Engineering; Leroy Amada, Assistant housekeeper; Jenny Guerrero, Assistant Housekeeper; Tom Mattson, Chief Engineer; Bill Robinson, Grounds Supervisor; and Leilani Gerling, Assistant Front Office Manager. In accordance with the stipulation of the parties, the above-named individuals are excluded from the unit.

7/ The attorneys for Local 142 contend that the eligible voters should be given the opportunity to cast their ballots for either Local 142 or Local 5 but not to vote against union representation. This argument is based on the fact that both the Association and Village employees were represented prior to June 1, 2000 by either Local 142 or Local 5. However the established Board policy for conducting elections requires that the employees be given the choice of voting against representation by either labor organization. National Labor Relations board, Casehandling Manual, Representation Proceedings (Part Two), Sections 11350.1-11350.2. Accordingly, the request of Local 142 is denied.

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